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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ZAPATA - HAYNIE CORPORATION and
HARTFORD INSURANCE COMPANY

Petitioners

versus

SUNNY G. WARD, Widow of
JOHN D. WARD, Deceased

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

(1) Whether a land based airplane pilot who died when his aircraft crashed in navigable waters two miles off the Mississippi Coast was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §902(3), and is thus covered under the Act.

(2) Whether injury or death in/on navigable waters, in and of itself, satisfied the dual "situs-status" test imposed by the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, and enforced previously by this Court, but ignored and rejected by the Court of Appeals in this case below.

(3) Whether workers who would have been covered by the Longshoremen and Harbor Workers' Compensation Act prior to the 1972 Amendments are covered thereafter simply by virtue of the fact that they were covered before.

(4) Whether or not a land based airplane pilot is a longshoreman or harbor worker, seaman or state compensation recipient.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption to this Petition, The Director, Office of Workmen's Compensation Programs, United States Department of Labor, was a named party in the Court of Appeals.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ZAPATA-HAYNIE CORPORATION and
HARTFORD INSURANCE COMPANY
Petitioners

VERSUS

SUNNY G. WARD, Widow of JOHN D. WARD, Deceased
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Zapata-Haynie Corporation and Hartford Insurance Company petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, A-1–A-9) is reported slip op. p. 4553, _____ F.2d _____, No. 81-4233. The opinion of the Benefits Review Board (App. B., *infra*, A-10–A-38) is reported at 14 B.R.B.S. 74 (1981). The decision of the Administrative Law Judge (App. C. *infra*, A-39–A-56) is reported as attached No. 79-LHCA-1676N.

JURISDICTION

The original opinion of the Court of Appeals was handed down on August 23, 1982. A Motion to Stay Issuance

of Mandate Pending Application to this Court was filed on September 3, 1982, and granted until September 22, 1982. A motion for further stay of mandate was filed on September 21, 1982, and granted until September 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen and Harbor Workers' Compensation Act [33 U.S.C. §§902(3) and 902(4)] provide in pertinent part:

> (3) The term "employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker. . .
>
> (4) The term "employer" means an employer of any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel).

Section 3(a) of the Longshoremen and Harbor Workers' Compensation Act [33 U.S.C. §903(a)] provides in pertinent part:

> Sec 3.(a) Compensation shall be payable under this Act in respect of disability or death

of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel. . .

STATEMENT

1. John D. Ward, the decedant, was an employee of the petitioner, Zapata-Haynie Corporation (hereinafter Zapata). Ward's employment required him to pilot a land based Cessna 172 aircraft over the Gulf of Mexico and locate menhaden fish for fishing boats operated by Zapata. On September 11, 1978, Ward was killed when his plane crashed into the Mississippi Sound enroute to his base airport near Ocean Springs, Mississippi.

In carrying out the activities of his employment, Ward had no dockside activity; no responsibility related to ship repair, shipbuilding, shipbreaking, loading, unloading, repairing or building a vessel; and, no work around any pier, wharf, dry dock, terminal, buildingway, marineway or other adjoining area customarily used by an employee in loading, unloading, repairing or building a vessel. Ward never flew amphibious aircraft and never landed on any boats, vessels, islands or drilling platforms. At the time of his death, he was transporting neither men nor equipment to any offshore location. Ward never had to board a vessel or be present on any dock to unload or assist in unloading. Ward never traveled by boat or seaplane. Ward's entire employment was carried out on land miles from a dock, or

in the cockpit of his land based plane. The only relationship that his plane had to the sea was that it impacted thereon the date of his death.

2. The widow of Ward was paid compensation under the Mississippi Workmen's Compensation Act. She filed a claim for compensation under the Longshoremen and Harbor Workers' Compensation Act (hereinafter LHWCA or Act), 33 U.S.C. §901, et seq. The petitioners denied that Ward was covered under the Act, and the case was referred to an administrative law judge for a formal hearing on the coverage issue, pursuant to Section 19 of the Act, 33 U.S.C. (& Supp. III) §919. After an evidentiary hearing, the Administrative Law Judge concluded that Ward was covered by the Act. Petitioners appealed the Administrative Law Judge's decision to the Benefits Review Board pursuant to Section 21(b) (3) of the Act, 33 U.S.C. §921 (b) (3).

The Benefits Review Board reversed the Administrative Law Judge with a two to three vote with all members relying on different legal grounds for their decision (App. B, *infra*, A-19–A-36). One member denied coverage finding that Ward was a member of the "crew of a vessel" and therefore excluded from coverage by 33 U.S.C. § 902(3). Another member concurred in the denial of benefits but made his decision on the basis that Section 2(3) of the Act, 33 U.S.C. §902(3), "establishes an occupational as opposed to a geographical test for maritime employment" and in doing so followed the teachings of *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979); *Sedmak v. Perini North River Associates*, 9 B.R.B.S. 378, B.R.B. No. 77-896 *et al.* (1978); *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, (2d Cir. 1980), *cert. denied*, 101 S. Ct. 953 (1981). The third member dissented holding that the jurisdictional requirements of Section 2(3) and

3(a) of the Act, 33 U.S.C. §§902(3), 903(a) were met and that Ward was not a "member of a crew of any vessel" under Section 2(3) of the Act.

The respondent Ward sought review of the Board's decision in the Court of Appeals pursuant to Section 21(c) of the Act, 33 U.S.C. §921(c). The Court of Appeals reversed the decision of the Board (*Ward v. Director, Office of Worker's Compensation Programs, United States Department of Labor, et al.* slip op. p. 4553) citing the Court of Appeal's decision of a few days earlier of *Boudreaux v. American Workmen, Inc.*, 680 F.2d 1034 (5th Cir. 1982) (en banc),[1] and holding that "employees injured on water during the course of their employment met both the situs and status tests." *Id.* at 1039, 1045. The Court further decided that coverage for "status" was not limited to occupations, slip op. p. 4555. The Court of Appeals further found (1) that Ward was engaged in an "activity" that was maritime and therefore he was covered, slip op. p. 4556; (2) that Ward was not a member of a crew of a vessel, slip op. p. 4556; (3) that a plane was not a vessel under the Jones Act,[2] slip op. p. 4557 and additionally, but importantly, for this Appeal the Court relied on a pre-1972 Amendment case to support its position that an employee injured in the regular course of his employment on the navigable waters of the United States *automatically* meets both the status and situs tests, slip op. p. 4555, emphasis supplied.

1/ Petition for a Writ of Certiorari is to be filed in *Boudreaux* if not already filed at this time.

2/ This opinion based on a decision of same date of Ward, styled *Smith v. Pan Air Corp.*, slip op. p. 4539, _____ F.2d _____, No. 81-3522.

REASONS FOR GRANTING THE PETITION

This case presents a number of significant unresolved questions under the LHWCA, as amended in 1972, such as the following:

(1) The case squarely presents a most important issue concerning the 1972 Amendment to the LHWCA that the Court noted but left unaddressed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265 N. 25 (1977): "Whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined."

(2) The decision in the Court below is based on an erroneous interpretation of the decisions of this Court, to include *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed.2d 225 (1979) and *Northeast Marine Terminal Co. v. Caputo, supra.*

(3) The decision in the Court below is in conflict with the other major maritime circuits of the country and this Court should grant review to resolve the conflicts.

(4) This case presents the novel question of whether a land based airplane pilot is a fisherman; crewmember of a vessel; a Jones Act seaman; a state compensation covered employee; or, one covered by the LHWCA.

ARGUMENT ON POINT 1

One of the questions presented here was left unaddressed in *Northeast Marine Terminal Co. v. Caputo, supra.* Prior to 1972, courts focused solely on the location of the injury

to determine whether the Act applied. Former Section 3(a), previously codified at 33 U.S.C. (1970 ed.) §903(a), provided that compensation was payable for any injury occurring upon the navigable waters of the United States (including any dry dock). . ." Subsequent to the passage of the 1972 Amendments, especially in view of the Amendments to Sections 2(3) and 3(a), 33 U.S.C. §§902(3) and 903(a), there was a requirement that both a geographical *and* an occupational test be met. This position is supported by this Court's decision in *Caputo, supra,* and reaffirmed in *P. C. Pfeiffer Co. v. Ford, supra.*

The Court of Appeals in this case totally ignores the occupational test and rules that an employee injured in navigable waters *automatically* is covered by the LHWCA whether he is an airline pilot or not.[3/] This decision completely abrogates the indisputable Congressional purpose of the Act; rejects the legislative history of the Act; and, moreover, it ignores the teaching of *P. C. Pfeiffer Co. v. Ford, supra,* and *Northeast Marine Terminal Co. v. Caputo, supra.*

In this case, therefore, the Court of Appeals bases its conclusions on two premises, (1) that there was no intention of restricted coverage by the 1972 Amendments, and, (2) everything done on water is by definition "maritime employment" including flying land based aircraft! It is respectfully submitted that there is a dual test under the Amendments to the LHWCA of 1972, and the teachings of this Court interpreting the Amendments and pre-1972

3/ The Court of Appeals cites a pre-1972 case of *NALCO Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969) in support of its position that one meets both the situs and status test by merely being injured in navigable waters.

authorities are not controlling, 4/ and the Court should speak to the point.

ARGUMENT ON POINT 2

Review by this Court is particularly appropriate because the Court of Appeals' opinion in this case is based on an erroneous interpretation of *P. C. Pfeiffer Co. v. Ford, supra,* and *Northeast Marine Terminal Co. v. Caputo, supra,* as to the definition of "maritime employment" under the Act.

In *Caputo, supra,* this Court clearly enunciated the fact that the Congress found it necessary in 1972 to describe affirmatively the class of worker covered by the Act. 5/ The definitive classes given by the Act and recognized in *Caputo do not* contain a land based airplane pilot who was a fish spotter. This Court also unequivocably stated in *Caputo* that the 1972 Amendments *changed* what had previously been *only* a test of "situs" for compensability to a two-requirement test of "situs" and "status". 6/ Additionally, *Caputo* established that the Act, as amended, focused on "occupation - longshoreman, harbor worker,

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4/ For example, see: *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S. Ct. 179 (1976); *Fusco v. Perini North River Association*, 601 F.2d 659 (2d Cir. 1979); *vacated and remanded*, 444 F.2d 1028, 100 S. Ct. 697 (1980); *on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131, 101 S. Ct. 953 (1981).

5/ See *Northeast Marine Terminal Co. v. Caputo, supra*, at 53 L.Ed. 2d 320 at p. 333.

6/ *Ibid*, p. 334.

ship repairman, shipbuilder, shipbreaker." 7/

In *P. C. Pfeiffer Co. v. Ford, supra,* this Court again clearly, unequivocably, and without reservation stated that "maritime employment embodied an occupational rather than a geographic concept" and that "maritime employment referred to status rather than situs". 8/ The Court likewise plainly stated that "status" was an occupational test. 9/ The Court below interprets these cases to hold that there is no "status" test that is existant if the injury occurs on water and, moreover, the fortutious touching of water by a land based airplane pilot mystically merges him into an occupation covered by the Act.

The teachings of *Northeast Marine Terminal Co. v. Caputo* and *P. C. Pfeiffer Co. v. Ford* reflect a dual test *not* just a geographical test. 10/ The existence of a dual test indicates by its very existence the fact that some occupations done over water are not necessarily maritime. See, for example, the occupations in *Weyerhauser Co. v. Gilmore,* 528 F.2d 957 (9th Cir. 1975); *cert. denied,* 429 U. S. 868, 97 S. Ct. 179 (1976), and in *Fusco v. Perini North River Associates,* 601 F.2d 659 (2d Cir. 1979), *vacated and remanded,* 444 U.S. 1028, 100 S. Ct. 697 (1980); *on remand,* 622 F.2d 1111 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131, 101 S. Ct. 953 (1981).

7/ *Ibid,* at p. 338, 340.

8/ *P. C. Pfeiffer Co. v. Ford,* at 62 L.Ed.2d 234.

9/ *Ibid,* at p. 235.

10/ This Court has inferentially by denial of petition for writ held that there is a dual test *after* the 1972 Amendments and same occupations covered before 1972 Amendments are not subsequently covered. See cases cited, FN4, *supra.*

It is submitted that the Court below erroneously interpreted the ruling of *Caputo* and *Pfeiffer*, and, therefore, this Court ought to express its position so as to make uniform its rulings in all circuits. 11/

ARGUMENT ON POINT 3

The decision of the First, 12/ Second, 13/ Third, 14/ Fourth, 15/ and Ninth 16/ Circuits are in conflict and totally irreconcilable with the decision below, both to result and reasoning. Even more astounding is the fact that this decision is at variance with a prior decision of the Fifth Circuit. See, *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820 (1978) in which a workmen drowned on navigable waters was held not to be covered by the LHWCA.

11/ The dissent in *Boudreaux v. American Workmen*, 680 F.2d 1034, 1054 (5th Cir. 1982) (Petition for Writ of Certiorari pending) said the decision to ignore *P. C. Pfeiffer* was tantamount to "reversing" it - "a bold stroke indeed".

12/ *Graziano v. General Dynamics*, 663 F.2d 340 (1st Cir. 1981).

13/ *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 622 F.2d 1111 (1980), *cert. denied*, 449 U.S. 1131 (1981).

14/ *Dravo v. Banks*, 567 F.2d 593 (3rd Cir. 1977).

15/ *Caldwell v. Odgen Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), *rev'd* on other grounds in *Rodriguez v. Compass Shipping Co.*, ____ U.S. ____, 101 S. Ct. 1945, 68 L.Ed.2d 472 (1981).

16/ *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 19), *cert. denied*, 429 U.S. 868, 97 S. Ct. 179, 50 L.Ed.2d 148 (1976).

Petitioners are aware that this Court has granted the writ application in *Churchill v. Perini North River Association*, 652 F.2d 255 (2d Cir.), Docket No. 81-897, _____ U.S. _____ , 102 S. Ct. 1425 (1982); however, since *Churchill* was loading a vessel, a reversal would not reach the issues here presented since in this case there is nothing maritime about flying a land based aircraft. See, *Executive Jet Aviation, Inc. v. City of Cleveland*, 459 U.S. 249, 92 S. Ct. 493, 34 L.Ed.2d 454 (1972)

It is submitted that since there is a clear conflict in the Circuits as emphasized in *Churchill, supra*, where certiorari was granted to the Second Circuit and as reflected in the cases cited herein from the First, Second, Third, Fourth and Ninth Circuits, it is only left to this Court to establish uniformity by resolution of this conflict. 17/

This case also squarely presents another question previously but unanswered in *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 at p. 469 (1972) where the Court noted:

> We need not decide today whether an aviation tort case can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within the admiralty jurisdiction in the absence of legislation.

Ironically, *Executive Jet* is often cited for court approved

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17/ For full development of the conflict in the Circuits, see the dissents in *Boudreaux v. American Workmen, Inc.*, 664 F.2d 463 (5th Cir. 1981), at 469, and *Boudreaux*, rehearing en banc, 680 F.2d 1034 (5th Cir. 1982), at 1054.

exposition of "maritime employment" in LHWCA cases.[18] However, *Executive Jet, supra,* held, *inter alia,*

> . . .there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States. 34 L.Ed.2d 471.

This was true because a *land based* aircraft leaving a point on land (as Ward did) bore no relationship to "traditional maritime activity." 34 L.Ed.2d 470. It is submitted this case presents a dilemma that only this Court can remedy! If Ward's activity was one classified as a traditional maritime activity as defined by *Executive Jet,* then Ward comes under the admiralty jurisdiction of the Court and not the LHWCA. If Ward's activity was not cognizant under the concept of a "traditional maritime activity", he cannot be covered by the LHWCA because he lacks status. Ward cannot be a longshoreman and harbor worker, seaman, fisherman, and land based pilot and receive LHWCA benefits without being in direct conflict with the Court's existing precedents. To leave this question unanswered would open a "Pandora's Box" of unanswered questions that only this Court can resolve.

ARGUMENT ON POINT 4

Additionally, this case presents another important Federal-State conflict question which has not been decided, namely whether or not Ward was a fisherman and therefore,

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18/ See, *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied,* 429 U.S. 868, 97 S. Ct. 179, 50 L.Ed.2d 148 (1976).

a member of the crew of a vessel 19/ or a land based airplane pilot subject to the Mississippi Workmen's Compensation Act. 20/ Miss. Code Ann. §71-3-1, et seq. (1972).

The creation and confusion of the conflicts, unaddressed questions, dilemmas and novel questions plead for a review by the Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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19/ See App. B. *infra*, where one member of the Benefits Review Board so held relying on *Griffith v. Wheeling Pittsburg Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975); *McIntosh v. Parkhill-Goodloe Co., Inc.*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 761 (1978).

20/ This matter was accepted as compensable under the Mississippi Workmen's Compensation Act.

CERTIFICATE OF SERVICE

I, ALBEN N. HOPKINS, do hereby certify that I have this date mailed, first class postage prepaid, a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI to:

Clerk
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This, the 30th day of September, 1982.

ALBEN N. HOPKINS